

## SWITZERLAND

DR. ROLAND HUBER \*

The problem under examination is so complex that it would be impossible at this time to state more than the general principles.

The two main distinguishing criteria for the various cases are *domicile* and *nationality*.

A. Divorce jurisdiction is vested, according to Swiss law exclusively in the court of the domicile of the plaintiff, husband or wife (Sec. 144, Swiss Civil Code). The parties cannot bring the divorce action before another forum by mutual agreement (Fed. Court, 56 II 344). This rule is primarily one of domestic law and applies in the first instance to Swiss citizens.

B. If the divorce of Swiss spouses living abroad has been decreed by a court competent according to the law applicable in the country in which the decree was granted, it shall be recognized in Switzerland even when a divorce could not be obtained on the same ground under Swiss law (Sec. 7g, par. 3, Fed. Law concerning the Civil Law Relations of Domiciliaries and Residents of June 25, 1891, hereinafter, DRL).

C. A foreign spouse domiciled in Switzerland can bring a divorce action before the court of his domicile when he shows that according to the law of his home state the alleged (Swiss) divorce ground and the Swiss jurisdiction are recognized (Sec. 7h, par. 1, DRL).

These are the only statutory provisions which practice has to solve the questions of our topic, either by direct application or by analogy and interpretation.

I. Foreign divorces will, according to the above (Rule A), clearly not be recognized in Switzerland if the plaintiff is a Swiss citizen domiciled in Switzerland.

A. where both spouses are Swiss citizens

1. if they are both Swiss domiciliaries; or
2. if the plaintiff has his or her domicile in Switzerland, the

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\* The author is a partner of Pestalozzi and Gmuer in Zurich and received admission to the Zurich courts the Federal Court of Switzerland in 1960. He holds a doctorate of law from the University of Zurich.

defendant abroad (cf. Sec. 25 & 170, par. 1, Swiss Civil Code, entitling the wife to live separately);

- B. where the plaintiff is of Swiss nationality, the defendant of foreign nationality
  - 1. if they are both domiciled in Switzerland; or
  - 2. if the Swiss plaintiff is domiciled in Switzerland, the foreign defendant domiciled abroad.

II. Foreign divorces are, according to the interpretation given by practice to the statutory provisions, not recognized if the plaintiff is a Swiss citizen domiciled abroad and the defendant has his or her domicile in another state

- A. where both parties are Swiss citizens
  - 1. if the plaintiff is domiciled abroad, the defendant domiciled in Switzerland (Fed. Court 89 I 305); or
  - 2. if both spouses are domiciled abroad but in different states though this practice is not very clear;
- B. where the plaintiff is a Swiss national, the defendant a foreign national
  - 1. if the Swiss plaintiff is domiciled abroad, the foreign defendant domiciled in Switzerland; or
  - 2. if both spouses are domiciled abroad but in different states though this practice is not clear, either.

(In all cases under "II." the plaintiff has to bring the action before the court of his place of citizenship within Switzerland [Sec. 7g, par. 1, DRL].)

III. Where the plaintiff is a foreign national domiciled in Switzerland and the defendant is a Swiss national, foreign divorces are, in principle, not recognized except if the home state of the plaintiff does not recognize the Swiss jurisdiction. In this instance only, the foreign divorce by the competent court of the plaintiff's home state is recognized

- A. if both foreign plaintiff and Swiss defendant are domiciled in Switzerland; or
- B. if the foreign plaintiff is domiciled in Switzerland, the Swiss defendant domiciled abroad.

IV. Where the spouses are domiciled in the same foreign country and not at the same time also in Switzerland, and the plaintiff is a Swiss

citizen, foreign divorces are recognized fully if decreed by the competent court of the domiciliary state (Rule B)

- A. if both spouses are Swiss citizens domiciled in the same foreign state (Fed. Court 64 II 78); or
- B. if the plaintiff is Swiss, the defendant foreign, both domiciled in the same foreign state.

V. The last large group of cases consists of foreign divorces where

- A. no Swiss citizen is concerned, where both spouses are foreign nationals wherever domiciled; or
- B. where at least the plaintiff is a foreign national domiciled abroad.

These divorces are in principle recognized in Switzerland if they are recognized in the countries of which the parties are nationals or, in other words, if the court granting the divorce is recognized by their home states as having jurisdiction. The divorce will not be recognized if their home states do not recognize it, even if the spouses were at the time of the divorce action not domiciled in their home states and if the state of their domicile does recognize their divorce.

A divorce of two Italians would, therefore, never be recognized in Switzerland even if the plaintiff and defendant were divorced, and domiciled at the time of the divorce, in France.

It can be assumed, on the other hand, that the Rosenstiel divorce (16 NY 2nd, 64) would be recognized in Switzerland if the spouses were at the time of the divorce both citizens of the USA and if their domicile of origin was New York. This is about the only instance where migratory divorces could be recognized in Switzerland.

VI. In the cases under "III, a & b, IV, a & b, V, b" above, the Swiss authorities will investigate very meticulously if all conditions for recognition of the divorce are complied with. The main points are domicile and genuineness of domicile of the parties (Fed. Court 89 I 303), competence of the court (Fed. Court 89 I 303), due process including summons in correct form and full possibility for the defendant to appear and defend himself or herself, etcetera, and, finally, "public order." In fact, a lack of due process is also considered against our "public order" (Fed. Court 64 II 78).

"Against public order," with regard to the substantive ground for divorce, and, therefore, not recognized, is a repudiation under Islamic law (Fed. Court 88 I 52). Not very safe would be a divorce decreed

on the sole basis of the consent of the parties without any investigation by the court into the justification for the divorce (Fed. Court 88 I 50/51). Certain divorce grounds not known in our law might also be in opposition to our "public order" and recognition of the respective divorce be denied.

The effect of "public order" is absolute and cannot be avoided by agreement of the parties (Fed. Court 88 II 52).

VII. Switzerland is no longer a party to the International Divorce Convention of 1905.

Several bilateral treaties of Switzerland, especially on enforcement of foreign judgments, contain provisions also with regard to foreign divorces, which would have to be consulted in a given case.

"Domicile," in Swiss law, is somewhat less final than in Anglo-American law. It is defined as "the place where a person is staying with the intention of permanently remaining there (Sec. 23, par. 1, Swiss Civil Code)." It can be changed, e.g., by taking up a new job in another country and moving the household there. The problem of the "*bona fide* residence" is unknown. Swiss "domicile" is not primarily dependent on a time limit but rather on intention.

Also, the divorce law is rather liberal so that there is no real need for migratory divorces.

Swiss divorce procedure is governed by the principle that the court has to be convinced of the truth of the allegations of the parties before it can divorce them (Sec. 158, no. 1, Swiss Civil Code). There is no divorce solely based on the consent of the parties.

If a court has jurisdiction, the divorce can be *ex parte* or bilateral. But if the defendant does not appear although he or she has been duly summoned, it will be much harder for the plaintiff to prove the alleged grounds for divorce.

These latter rules of the domestic law will help, as all the rest of the domestic law, of course, to interpret the international rules.